IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 16, 2006 Session

ROBERT TURNER v. RICKY BATES D/B/A RB AUTO SALES

Appeal from the Circuit Court for Davidson County
No. 05C-803 Marietta M. Shipley, Judge

No. M2005-02285-COA-R3-CV - Filed on May 16, 2007

This appeal involves a dispute regarding the consequences of a default in payment of a car note. The purchaser defaulted on the note five months after purchasing the vehicle, and the dealer repossessed the vehicle and resold it. Thereafter, the purchaser filed suit against the dealer in the Davidson County General Sessions Court seeking to recover $3,000 of his $3,400 down payment on the theory that the dealer had wrongfully repossessed and sold the vehicle because he had paid the dealer a $400 "payment in the hole" to be used whenever he failed to make a required payment. The general sessions court awarded the purchaser $3,000, and the dealer perfected a de novo appeal to the Circuit Court for Davidson County. The trial court determined that there had been a miscommunication between the purchaser and the dealer regarding the application of the $3,400 down payment and ordered the dealer either to pay the purchaser $2,000 or to give the purchaser a $3,000 credit toward the purchase of another vehicle from the dealer. The dealer has appealed. We have determined that the plain language of the parties' contract compels reversal of the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Thomas J. Drake, Jr., Nashville, Tennessee, for the appellant, Ricky Bates d/b/a RB Auto Sales.

Terry R. Clayton, Nashville, Tennessee, for the appellee, Robert Turner.

OPINION

I.

On July 19, 2004, Robert A. Turner visited Ricky Bates d/b/a RB Auto Sales for the purpose of purchasing a vehicle. One of the more expensive vehicles on the lot, a 1998 Lincoln Navigator, caught Mr. Turner's eye. Mr. Turner negotiated the terms of the sale and the financing with Mr. Bates, and the parties memorialized their agreement in a one-page written contract.

The purchase price was $13,900. Mr. Turner made a down payment of $3,400 and agreed to pay the remainder in separate installments over the next three years. The interest rate was 21%, and Mr. Bates financed the transaction himself. Mr. Turner agreed to pay the balance over the next three years through monthly installment payments of $400. The first monthly payment of $400 was due August 19, 2004. If Mr. Turner defaulted on a single payment, the contract gave Mr. Bates the right to accelerate the loan and take immediate possession of the vehicle. The parties expressly waived any right to demand, waiver, and protest.

Mr. Turner was two days late with the first monthly payment. He made the September and October payments on time but was three weeks late with the November payment. Mr. Turner did not make the December 2004 payment.

In January 2005, Mr. Bates sent a tow truck to Mr. Turner's residence to recover the vehicle. Mr. Turner refused to surrender the vehicle, and the tow truck left. A few days later, Mr. Turner drove the vehicle back to the car lot and handed the keys to one of Mr. Bates's employees. The employee drove off with the vehicle and returned a few minutes later to give Mr. Turner his license plate and proof of insurance coverage. Another employee drove Mr. Turner part of the way home from the car lot.

Four to six weeks later, Mr. Turner returned to the car lot and spoke with Mr. Bates. He told Mr. Bates he wanted his vehicle back, but Mr. Bates explained that he had already sold it to another customer.[1] Mr. Bates offered to work with Mr. Turner on the purchase of a less expensive vehicle. Mr. Turner said he wanted either his vehicle back or a Cadillac that was on the lot. Mr. Bates was unwilling to sell Mr. Turner another expensive vehicle. Mr. Turner left, thinking there was no reason to argue because he "had everything in writing."

Two days later, Mr. Turner swore out a warrant against Mr. Bates in the General Sessions Court for Davidson County seeking the return of $3,000 of his $3,400 down payment. The general sessions court found in Mr. Turner's favor, and Mr. Bates appealed to the Circuit Court for Davidson County. At the de novo bench trial, Mr. Turner claimed the $3,400 down payment was actually a $3,000 down payment plus one "payment in the hole." Mr. Turner explained that colleagues at work advised him he could avoid late charges and credit problems by paying all his monthly bills one month in advance. That way, if he had trouble paying his bills one month, his creditors would simply apply the advance payment – the so-called "payment in the hole" – to his account.

Mr. Turner acknowledged he never discussed this "payment in the hole" theory with Mr. Bates. He even conceded that he had not followed the parties' written contract to the letter of the law. On questioning from the trial court, Mr. Turner admitted that he had never tried this "payment

[1] The balance due on the vehicle from Mr. Turner to Mr. Bates was $12,753.16, and Mr. Bates resold it for $12,800. The record on appeal does not reveal what Mr. Bates did with the $46.84 he made on the resale of the vehicle. Presumably he applied it towards repossession and collection costs, which Mr. Turner agreed to pay in the contract in the event he defaulted on his payments.

in the hole" concept with other merchants and that he tried it with Mr. Bates simply "to see if it worked." Mr. Turner did claim to have discussed this idea with one of Mr. Bates's employees after he missed his December 2004 payment. However, Mr. Turner admitted that the employee told him he did not know anything about that and that Mr. Turner would have to discuss the matter with Mr. Bates. Mr. Turner never discussed his "payment in the hole" theory with Mr. Bates.

The trial court entered an August 26, 2005 order finding that there had been a miscommunication between Mr. Turner and Mr. Bates regarding how the $3,400 down payment was to be applied. The court concluded it would be inequitable to allow Mr. Bates to retain the entire $3,400 down payment and ordered him to credit Mr. Turner $3,000 towards the purchase of any vehicle on the lot with a purchase price up to $13,400. The court offered Mr. Bates the alternative of paying Mr. Turner $2,000 directly by October 1, 2005. The court assessed costs against Mr. Bates, and Mr. Bates appealed.

II.

The standards this court uses to review the results of bench trials are well settled. With regard to a trial court's findings of fact, we will review the record de novo and will presume that the findings of fact are correct "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). We will also give great weight to a trial court's factual findings that rest on determinations of credibility. *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). If, however, the trial court has not made a specific finding of fact on a particular matter, we will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness. *Hardcastle v. Harris*, 170 S.W.3d 67, 78-79 (Tenn. 2004); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

Reviewing findings of fact under Tenn. R. App. P. 13(d) requires an appellate court to weigh the evidence to determine in which party's favor the weight of the aggregated evidence falls. There is a "reasonable probability" that a proposition is true when there is more evidence in its favor than there is against it. *Chapman v. McAdams*, 69 Tenn. (1 Lea) 500, 506 (1878); *see also* 2 MCCORMICK ON EVIDENCE § 339, at 484 (Kenneth S. Broun ed., 6th ed. 2006) (defining "proof by a preponderance" as "proof which leads the [finder of fact] to find that the existence of the contested fact is more probable than its nonexistence"). The prevailing party is the one in whose favor the evidentiary scale tips, no matter how slightly. *Parks Props. v. Maury County*, 70 S.W.3d 735, 741 (Tenn. Ct. App. 2001); *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999).

Tenn. R. App. P. 13(d)'s presumption of correctness requires appellate courts to defer to a trial court's findings of fact. *Nashville Ford Tractor, Inc. v. Great Am. Ins. Co.*, 194 S.W.3d 415, 425 (Tenn. Ct. App. 2005). Because of the presumption, an appellate court is bound to leave a trial court's finding of fact undisturbed unless it determines that the aggregate weight of the evidence demonstrates that a finding of fact other than the one found by the trial court is more probably true.

Parks Props. v. Maury County, 70 S.W.3d at 742. For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000).

The presumption of correctness in Tenn. R. App. P. 13(d) applies only to findings of fact, not conclusions of law. Accordingly, appellate courts review a trial court's resolution of legal issues without a presumption of correctness and reach their own independent conclusions regarding these issues. *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001); *Nutt v. Champion Int'l Corp.*, 980 S.W.2d 365, 367 (Tenn. 1998); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 71 (Tenn. Ct. App. 2001); *Placencia v. Placencia*, 48 S.W.3d 732, 734 (Tenn. Ct. App. 2000).

The proper interpretation of a written contract is a question of law. *Guiliano v. CLEO, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); *Nat'l Ins. Ass'n v. Simpson*, 155 S.W.3d 134, 138 (Tenn. Ct. App. 2004). Thus, a trial court's construction of a written contract is not entitled to a presumption of correctness on appeal. *State ex rel. Pope v. U.S. Fire Ins. Co.*, 145 S.W.3d 529, 533 (Tenn. 2004); *Angus v. W. Heritage Ins. Co.*, 48 S.W.3d 728, 730 (Tenn. Ct. App. 2000). We must review the written contract de novo and reach our own conclusions regarding its meaning and legal import. *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 335-36 (Tenn. 1983); *Pylant v. Spivey*, 174 S.W.3d 143, 150 (Tenn. Ct. App. 2003); *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993).

III.

Mr. Bates contends the trial court erred by looking beyond the four corners of the parties' written contract to ascertain the terms of their agreement. According to Mr. Bates, the trial court lost sight of the Tennessee Supreme Court's oft-repeated admonition that "[i]t is the function of a court to interpret and enforce contracts as they are written, notwithstanding they may contain terms which may be thought harsh and unjust," and that "[a] court is not at liberty to make a new contract for parties who have spoken for themselves." *Smithart v. John Hancock Mut. Life Ins. Co.*, 167 Tenn. 513, 525, 71 S.W.2d 1059, 1063 (1934).[2] We agree.

A.

The courts' goal in interpreting a written contract is to ascertain and give effect to the parties' intent. *Harrell v. Minnesota Mut. Life Ins.*, 937 S.W.2d 809, 814 (Tenn. 1996); *Bob Pearsal Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975). The search for the contracting parties' intent begins with the language of the contract itself. *Guiliano v. Cleo, Inc.*, 995 S.W.2d at 95; *Elliott v. Elliott*, 149 S.W.3d 77, 84 (Tenn. Ct. App. 2004). Each provision must be construed in light of the entire agreement, and the language in each provision must be given its

[2] *Accord Cain P'ship v. Pioneer Inv. Servs. Co.*, 914 S.W.2d 452, 464 (Tenn. 1996); *Shamrock Homebuilders, Inc. v. Cherokee Ins. Co.*, 225 Tenn. 236, 242, 466 S.W.2d 204, 206 (1971); *Petty v. Sloan*, 197 Tenn. 630, 639-40, 277 S.W.2d 355, 359 (1955); *Home Beneficial Ass'n v. White*, 180 Tenn. 585, 588, 177 S.W.2d 545, 546 (1944).

natural and ordinary meaning. *Buettner v. Buettner*, 183 S.W.3d 354, 359 (Tenn. Ct. App. 2005); *Elliott v. Elliott*, 149 S.W.3d at 84. Judicial interpretation of the writing is directed to the meaning of the writing in light of the circumstances. Restatement (Second) of Contracts § 202 cmt. b at 87 (1981). As the Tennessee Supreme Court, quoting the United States Supreme Court, explained one hundred years ago:

> [C]ourts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described.

Staub v. Hampton, 117 Tenn. 706, 742, 101 S.W. 776, 785 (1907). The courts continue to apply these principle today. *Higgins v. Oil, Chem. & Atomic Workers Int'l Union Local 3-677*, 811 S.W.2d 875, 879 (Tenn. 1991); *Hamblen County v. City of Morristown*, 656 S.W.2d at 334.

Unfortunately, written contracts do not always clearly convey the parties' intentions. When a contractual provision is ambiguous, it cannot be enforced according to its plain meaning, *Johnson v. Johnson*, 37 S.W.3d at 896, and the courts must resort to established rules of contract construction to ascertain the parties' intent, *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002); *Kafozi v. Windward Cove, LLC*, 184 S.W.3d 693, 699 (Tenn. Ct. App. 2005). Ambiguity is an objective concept in this context. *Dunn v. Duncan*, No. M2004-02216-COA-R3-CV, 2006 WL 1233046, at *3 n.4 (Tenn. Ct. App. May 8, 2006) (No Tenn. R. App. P. 11 application filed); 21 Steven W. Feldman, *Tennessee Practice: Contract Law and Practice* § 8:54, at 1001 (2006). A contractual provision is ambiguous when the parties' intentions cannot be reliably ascertained by considering the language of the provision in light of the surrounding circumstances. *Dunn v. Duncan*, 2006 WL 1233046, at *3 n.4. A provision is not ambiguous simply because the parties interpret it differently. *Staubach Retail Servs.-Southeast, LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 526 (Tenn. 2005). A contractual provision is ambiguous only when its meaning is so uncertain that it can be reasonably understood to mean more than one thing. *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d at 890; *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 512 (Tenn. 2001).

B.

Mr. Turner's case founders on the plain language of the written contract. The contract expressly denominates the entire initial payment of $3,400 as a down payment, not a down payment plus one "payment in the hole." Mr. Turner's "payment in the hole" theory appears nowhere in the written agreement. Mr. Turner knew the importance of getting everything in writing, yet he deliberately chose not to include the "payment in the hole" concept in his contract with Mr. Bates.

Moreover, the record contains not a scintilla of evidence that Mr. Bates in any way deceived or defrauded Mr. Turner. It is not inequitable to require legally competent persons to abide by the terms of written contacts they have voluntarily entered into. The trial court committed legal error in concluding otherwise in this case.

IV.

We reverse the trial court's August 26, 2005 order and remand the case with directions that Mr. Turner's complaint be dismissed and for whatever further proceedings consistent with this opinion may be required. We tax the costs of this appeal to Robert A. Turner for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.